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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

STATE OF ILLINOIS,
Petitioner,
vs.

CHARLES HATTERY,
Respondent.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE
SUPREME COURT OF ILLINOIS

NEIL F. HARTIGAN,
Attorney General of the
State of Illinois,
MARK L. ROTERT
Assistant Attorney General
100 W. Randolph Street,
Suite 1200
Chicago, Illinois 60601,
Attorney for Petitioner.

RICHARD M. DALEY,
State's Attorney of
Cook County, Illinois,
500 Richard J. Daley Center,
Chicago, Illinois 60602,
JOAN S. CHERRY,*
KEVIN SWEENEY,
Assistant State's Attorneys,
Of Counsel.
* Attorney of Record
(312) 443-5496

OUESTIONS PRESENTED

Whether a criminal conviction may be reversed for alleged ineffective assistance of counsel when there is no showing of prejudice to the defendant.

2.

Whether it is permissible under the Sixth Amendment for a defense attorney to tell a jury at trial that his client committed the crime charged, but that there were mitigating circumstances which should bar a death sentence.

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STATE OF ILLINOIS,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioner, the State of Illinois, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Illinois Supreme Court which was entered on November 21, 1985.

OPINION BELOW

The opinion, judgment and order of the Illinois Supreme Court is reproduced as Appendix A to this Petition and is published as People v. Hattery, 109 Ill.2d 449, 488 N.E.2d 513 (1985). The order of the Illinois Supreme Court denying rehearing is reproduced as Appendix B to this Petition.

JURISDICTION

The opinion, order and judgment of the Illinois Supreme Court was entered on November 21, 1985. The order of the Illinois Supreme Court denying rehearing was entered on February 4, 1986. This Petition for a writ of certiorari is filed within 60 days of that date.

The judgment of the Illinois Supreme Court was explicitly based on federal constitutional law; in particular, on the Sixth Amendment to the United States Constitution and on the decisions of this Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Accordingly, the jurisdiction of this Court in invoked under 28 U.S.C. §1257(3).

CONSTITIONAL PROVISION AT ISSUE

UNITED STATES CONSTITUTION--SIXTH AMENDMENT:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Respondent Charles Hattery was charged in the Circuit Court of Cook County, Illinois with the murders of Trenette Anderson and her two children, Reshonda and Albert, Jr. (R. 501-506) At trial defense counsel, in an effort to avoid a death sentence, told the jury that respondent had committed those crimes, but had been compelled to commit the murders by his co-defendant. (R. 160-161) The jury found respondent guilty of the three murders and later approved a death sentence. The Illinois Supreme Court reversed the convictions and sentence, holding that the statement of respondent's attorney at trial was a per se violation of the Sixth Amendment right to effective assistance of counsel.

The State's case at trial was based on respondent's confessions and on the testimony of Albert Anderson, Sr., husband of Trenette and father of Reshonda and Albert, Jr. That evidence showed that on December 5, 1982, respondent came to the Anderson home along with Rufus Mister, later a co-defendant. (R. 171-173) Rufus Mister and Albert Anderson, Sr. had an argument about drugs. (R. 174) They then left the apartment to buy some drugs on the street, leaving respondent behind with Trenette and the two children. (R. 175)

According to one of respondent's confessions, Rufus Mister had told him to kill the mother and her two children if Mister was not back in five minutes. (R. 276) According to respondent Mister threatened to harm respondent and respondent's family if the victims were not

killed. (R. 287) Respondent told the police that he had waited five minutes, and then told Trenette Anderson that her time was up. (R. 243) According to respondent he then stabbed and strangled Mrs. Anderson and then strangled Reshonda and Albert, Jr. (R. 243)

Other evidence showed that Mrs. Anderson's body had been discovered mostly nude, that she had been strangled, and that semen had been discovered in her vagina. (R. 180, 192, 351) Reshonda, age seven months, and Albert, Jr., age 22 months, had also died of strangulation. (R. 194-196)

Before trial respondent had unsuccessfully moved to suppress his confessions as unlawfully obtained. (R. 1-22) Under Illinois law the admissibility of the confessions could be challenged on appeal only if respondent went to trial rather than pleading guilty. Peopel v. Del Vecchio,

105 Ill.2d 414, 475 N.E.2d 840 (1985).

Respondent went to trial, but under Illinois law compulsion is not a defense to murder but is a mitigating factor which may prevent a death sentence. Ill. Rev. Stat. 1981, secs. 7-11, 91(c)(4). Accordingly defense counsel told the jury that respondent had been compelled by threats of death of kill the victims, that nevertheless the jury would find respondent guilty of the murders, but that the question was whether respondent should be sentenced to death for trying to save the lives of his family. (R. 160-161)

The Illinois Supreme Court held that this statement by defense counsel was a per se violation of the Sixth Amendment right to effective assistance of counsel. Petitioner seeks a writ of certiorari to review that judgment.

REASONS FOR GRANTING THE WRIT

RESPONDENT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE (1) HIS ATTORNEY'S TACTICS WERE THE BEST AVAILABLE TO SAVE RESPONDENT FROM A CONVICTON AND DEATH SENTENCE, (2) THERE WAS NO SHOWING THAT RESPONDENT WAS PREJUDICED BY ANY OF HIS ATTORNEY'S ACTIONS.

Even in retrospect, it is clear that respondent's attorney used the best possible tactics in the state trial court. That attorney's goals were (1) to preserve the question of the admissibility of respondent's confessions for appellate review, and (2) to develop all possible mitigating evidence which could prevent imposition of a death sentence. Respondent's attorney accomplished both goals, and thus acted in the best interests of his

client. Nevertheless, the Illinois Supreme Court held that the attorney's actions constituted ineffective assistance of counsel per se, and thus reversed the convictions without any showing of prejudice to respondent.

This case presents two questions, one of which has been decided by this Court and one of which has not. Those questions are:

> 1. Whether a criminal conviction may be reversed for ineffective assistance of counsel when there is no showing of prejudice to the defendant.
>
> 2. Whether it is permissible for a defense lawyer to plead to a jury at trial that, while his client committed the crime charged, there were mitigating circumstances which should bar a death sentence.

The holding of the Illinois Supreme Court, that respondent's convictions should be reversed without any showing of prejudice, violates principles of constitutional law

which have been established by this Court. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). However, this Court has not yet decided whether an attorney may plead to a jury at trial that, although his client committed the crime charged, there were mitigiating circumstances which should bar a death sentence. But this Court should decide that such tactics are permissible when they are the best possible way for an attorney to protect his client's interests in the face of overwhelming proof of guilt. A writ of certiorari should be granted to enforce the Strickland and Cronic decisions of this Court and to free defense attorneys to use the best available tactics in their efforts to avoid imposition of death sentences.

The tactics used by defense counsel here were in the best interests of respondent, but under the Illinois Supreme Court's decision that fact was irrelevant. The defense strategy here was to attack the admissibility of respondent's confessions. If the trial judge refused to suppress the confessions, then the defense strategy was to preserve that issue for appellate review, while trying to persuade the jury to reject a death sentence. The tactics used by defense counsel were the best possible way to fulfill this overall strategy.

A plea of guilty was impossible here, because that would have forfeited the right to challenge the admissibility of the confessions on appeal and in post-conviction proceedings. People v. Del Vecchio, 105 Ill.2d 414, 475 N.E.2d 840 (1985); People v. Brown, 41 Ill.2d 503, 244 N.E.2d 159 (1969).

Nor would it have been possible or in respondent's best interests to contest the evidence of guilt at trial. For one thing, evidence of guilt was overwhelming and no defense was available. More importantly, respondent's defense against a death sentence was inconsistent with any effort to contest guilt. Respondent claimed that he had been forced to commit the murders by threats of death to himself and his family. That was no defense to a charge of murder under Illinois law, but it was a mitigiating factor which could have prevented a death sentence. People v. Gleckler, 82 Ill.2d 145, 411 N.E. 2d 849 (1980); Ill. Rev. Stat. 1981, ch. 38, secs. 7-11, 9-1 (c)(4). Thus respondent's attorneys refused to contest guilt during trial because they were trying to develop mitigating evidence which could keep their client from being sentenced to death.

The Illinois Supreme Court thus has held that it violates the Sixth Amendment for a defense attorney to adopt the best possible tactics to defend his client against a death sentence. Such a dangerous and irrational ruling should be reviewed by this Court.

In particular, the Illinois Supreme Court specifically held that no showing of prejudice to respondent was necessary before reversing the murder convictions on grounds of ineffective assistance of counsel. (App. A, p. 30) That holding is contrary to the decisions of this Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1985) and United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Those decisions hold that, with certain exceptions which do not apply here, a defendant attacking his conviction on grounds of in-

effective assistance of counsel must show that his attorney's actions probably changed the outcome of the proceeding.

In Strickland this Court held that prejudice will be presumed when representation by counsel is denied, when the state interferes with representation by counsel, or when defense counsel is subject to an actual conflict of interest. Otherwise, this Court held, "...actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2067, 80 L.Ed.2d 674, 697 (1984).

In Cronic this Court likewise held that ineffective assistance of counsel would not be presumed, but that specific prejudical errors by defense counsel must be shown. The Illinois Supreme Court,

however, cited Cronic in support of its decision, relying on certain language in a footnote, United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 2045 fn. 19, 80 L.Ed.2d 657, 666 fn. 19 (1984). That footnote stated:

> Of course, the Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade. At the same time, even when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond a reasonable doubt. (Citation omitted)

For two reasons, this footnote in Cronic does not support the decision of the Illinois Supreme Court. Firstly, Cronic simply does not deal with the special circumstances of a death penalty case, when often there may be no doubt of guilt but will be a genuine possibility of avoiding a death sentence. Second and more important is the fact that are many ways in which a defense attorney may attempt to avoid a conviction, including an effort to contest the admissibility of the State's evidence. Here defense counsel tried to prevent a conviction by moving to suppress respondent's confessions, and the defense tactics at trial were an attempt to preserve that issue for appellate review. This is not a case where a defense attorney gave up, but rather a case in which defense counsel vigorously contested the admissibility of the State's evidence first in the trial court and then on appeal.

Respondent's sole possible defense to the charge was that his confessions were inadmissible. Indeed it is a common defense tactic to contest a charge by challenging the admissibity of the prosecution's evidence, even when no other defense is available. Since respondent's attorney attacked the State's case in that way, he fulfilled his duty to contest the evidence against respondent by the best means available.

Thus defense counsel here used the best possible means, and indeed the only possible means, to contest the State's case for a conviction and death sentence. Since respondent received a vigorous defense, his convictions may not be reversed on grounds of ineffective assistance of counsel unless there is a showing of actual prejudical error by his attorney. Since the Illinois

Supreme Court required no such showing, its decision is contrary to this Court's interpretation of the Sixth Amendment. Accordingly this Court should grant review.

Review should also be granted because this case presents an important question which has not previously been considered by this Court. That question is whether a defense attorney should be free to adopt the best possible tactics to avoid imposition to a death sentence on his client, even when those tactics involve refusing to contest the evidence of guilt.

Here the evidence against respondent was overwhelming, consisting of several confessions and of other evidence implicating respondent in the murders. Thus defense counsel used the trial, not to contest guilt, but to develop mitigating evidence against a death sentence. Respondent's attorney attempted to show that

co-defendant Rufus Mister (who was present at trial but was acquitted by the judge) had used threats of death to force respondent to commit the murders. The Illinois Supreme Court held that these efforts by respondent's attorney to avoid a death sentence were impermissible.

This is a situation which will arise again in the future. It is not a rare thing for the prosecution to have overwhelming proof that a defendant has committed a murder, or for the best defense strategy to be to attempt to avoid a death sentence. Defense attorneys should be free to attempt by the best means available to avoid having their clients sentenced to death. Since the Illinois Supreme Court has refused to allow defense attorneys such freedom, this Court should grant review.

It is true that here the death penalty hearing followed the trial, but the same jury was used at both the trial and that hearing. Moreover, in deciding on a death sentence that jury was required to consider the evidence at trial. People v. Lewis, 88 Ill.2d 129, 147, 430 N.E.2d 1346, 1354 (1981). Thus the trial represented the only chance for respondent's attorney to cross-examine the State's witnesses to the crime and confessions in order to establish the mitigating factor of complusion. Ill. Rev. Stat. 1981, ch. 38, sec. 9-1(c)(4). The Illinois Supreme Court should not have ruled that it is unlawful for defense attorneys to try to show mitigating evidence in that fashion.

The Illinois Supreme Court also relied on the Boykin decision in support of its ruling. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). But

Boykin requires only that a defendant be given certain warnings when he gives up his defenses to a charge and pleads guilty. Here, on the other hand, respondent did not give up his defense to the charge, but vigorously contested the admissibility of his confessions in the trial court and carefully preserved that issue for appellate review. Since the sole possible defense to the charge was preserved rather than abandoned, there was nothing like a plea of guilty in this case.

The Illinois Supreme Court also cited a number of lower court decisions for the proposition that a defense attorney is not permitted to concede his client's guilt during trial. But, with one exception, none of these were death penalty cases in which persuading a jury to reject a death sentence is often more important and feasible than contesting evidence of guilt.

The Spraggins case did involve the death penalty, but there defense counsel's concession of guilt contradicted his client's testimony and was not motivated by need to preserve issues for appellate review. Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983), cert denied, 105 S.Ct. 1776.

Finally, apart from the principles of law invclved, this Court may consider how strange the decision of the Illinois Supreme Court is from a rational point of view. Respondent committed a horrible crime, and was so clearly guilty that even his lawyer, acting in his client's best interests, was forced to concede that the State's evidence was true. The bizzare outcome has been that respondent's convictions have been vacated precisely because the evidence against him was so strong. Of course the Illinois Supreme

Court is free to require such a result under state law, and could do so on remand in this case. But the Illinois Supreme Court should not be free to adopt an irrational interpretation of the Sixth Amendment which is contrary to the decisions of this Court.

In conclusion, the Illinois Supreme Court here has reversed the convictions on grounds of ineffective assistance of counsel without requiring any showing of prejudice to respondent. Certiorari should be granted because that ruling is contrary to this Court's interpretation of the Sixth Amendment. In addition, the Illinois Supreme Court had ruled that it is unlawful for defense attorneys to use certain tactics in an effort to avoid imposition of death sentences. Certiorari should be granted so that defense attorneys will be free to defend death penalty cases in the

way that best protects the interests of their clients. Therefore petitioner respectfully requests that a writ of certiorari issue in this matter.

CONCLUSION

For the foregoing reasons, the State of Illinois respectfully requests that a writ of certiorari issue to review the judgment of the Illinois Supreme Court.

Respectfully submitted,

NEIL F. HARTIGAN,
Attorney General of the
State of Illinois,
MARK L. ROTERT
Assistant Attorney General
100 W. Randolph Street,
Suite 1200
Chicago, Illinois 60601,
Attorney for Petitioner.

RICHARD M. DALEY,
State's Attorney of
Cook County, Illinois,
500 Richard J. Daley Center,
Chicago, Illinois 60602,
JOAN S. CHERRY,*
KEVIN SWEENEY,
Assistant State's Attorneys,
Of Counsel.
* Attorney of Record
(312) 443-5496

APPENDIX A

Opinion of the Illinois Supreme Court in People v. Charles Hattery (No. 58789, Nov. 21, 1985). Published as People v. Hattery, 109 Ill.2d 449, 488 N.E.2d 513 (1985).

Filed November 21, 1985:

Docket No. 58789-Agenda 36-May 1985.

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellee v. CHARLES HATTERY, Appellant

JUSTICE MORAN delivered the opinion of the court:

Following a jury trial in the Circuit Court of Cook County, defendant, Charles Hattery, was convicted of the murders of Trenette Anderson and her two children, Reshonda and Albert, Jr. (A codefendant, Rufus Mister, was found not guilty in a bench trial conducted simultaneously with defendant's jury trial.) Pursuant to section 9-1(d) of the Criminal Code of 1961 (Ill. Rev. Stat. 1981, ch. 38, par. 9-1 (d)), the State requested a death penalty hearing, which was heard by the same jury. The jury found that the necessary aggravating factors existed, and that there were

no mitigating circumstances sufficient to preclude imposition of the death penalty. The court thereupon sentenced defendant to death on the murder convictions. Defendant brings a direct appeal to this court (Ill. Const. 1970, art VI, sec. 4(b); 87 Ill2d R. 603), alleging numerous errors in all stages of the proceedings.

The record discloses that on December 4, 1982, at about 1 a.m., Albert Anderson left his Chicago apartment and walked to a nearby store to purchase a pack of cigarettes. The store was closed. While walking home, he met the defendant, and "Smooth," whom Anderson identified as Rufus Mister. Mister immediately began arguing with Anderson about drugs. Mister claimed that he had supplied Anderson with drugs before, and wanted him to reciprocate. Anderson, in an effort to calm Mister, said he was

willing to discuss the matter and invited the men to his apartment.

Upon arriving at the apartment, they were met by Anderson's wife, Trenette. The couple's two children, Reshoda, age 7 months, and Albert Jr., who was 22 months old, were asleep in the bedroom. Anderson testified that Mister again started "hollering about drugs." Anderson offered to give him money, but Mister insisted that Anderson help him find drugs. He agreed to accompany Mister to the home of "Fluky," a local drug supplier. Mister told defendant to stay in the apartment with Trenette and the two children. Anderson also overheard Mister tell defendant that if he did not return in five minutes, defendant "knows what to do." Anderson and Mister then left the apartment.

The men's initial effort to obtain drugs was unsuccessful, and Mister insisted that they continue to search for drugs. Anderson testified that they arrived back at his apartment at about 6 a.m. They were accompanied by Mister's girlfriend, Kathy Robinson, and two other women, whom Anderson identified only as Penny and Pearl. Anderson knocked at the back door several times. When no one answered, Mister kicked the door down. They walked through the kitchen into the living room. Anderson noticed that there was blood on the living room floor. They then walked into the bedroom, where they found Trenette's body on the bed. Anderson observed that her night gown was pulled up over her breasts and that her wrist had been cut. The body of his son, Albert Jr., also was in the bed. Pearl walked over to

the crib and picked up Reshonda. As she did so, the baby's head fell backwards. Anderson stated, "[O]h, my God, no, not my kids too." He then placed Reshonda's dead body on the bed next to the body of her mother.

In a statement taken by an Assistant State's Attorney and transcribed by a court reporter, defendant, age 22, said that Mister ordered him to stay behind in the apartment while Mister and Anderson searched for drugs. Mister told him that if he did not return in five minutes, defendant was to kill Anderson's wife and two children. Mister threatened to harm defendant and his family if defendant did not comply with Mister's orders. After they left, defendant set his digital watch and proceeded to keep track of the time. When five minutes passed, he told Trenette that

he planned to kill her. Trenette screamed and ran toward a door. Defendant pulled his knife, and as he attempted to grab Trenette, he cut her wrist. When he caught Trenette he strangled her, and then undressed her. As he was about to carry her body into the bedroom Albert, Jr., who had been awakened by the noise, walked into the living room. Defendant grabbed the boy, choked him, and placed his body on the bed. He then carried Trenette's body into the bedroom and placed it on the bed next to Albert, Jr., Defendant walked over to the crib where Reshonda was sleeping and strangled her. He left Reshonda's body in the crib. He remained in the apartment for another half hour, until about 4 a.m. Defendant later disposed of the knife in a garbage dumpster.

John Salyers, a Chicago police officer, testified that upon arriving at the Anderson apartment at about 6:30 a.m., he observed Mister standing in front of the building in the company of police officers. Salyers and two other officers walked to the back door, where they noticed that the door appeared to have been forced open. They walked through the kitchen to the living room. From there Salyers observed Anderson in the bedroom holding a knife. Salyers drew his revolver. As he did so, Anderson looked up, and then began to make jabbing motions with the knife toward his own chest. Salyers ordered Anderson to drop the knife. He handcuffed Anderson and placed him in the kitchem. Salyers then returned to the bedroom where he saw the body of one adult female and the bodies of two children on the bed. He later deter-

mined that the victims were Trenette, Reshonda and Albert, Jr. Trenette's body was partially nude. Salyers also found blood stains on the living room floor. An evidence technician was called to take photographs. Anderson and Mister were then transported to the police station.

Dr. Robert Stein, chief medical examiner of Cook County, testified that he performed autopsies on the bodies of the three victims on December 6, 1982. His examination of Trenette revealed contusions and abrasions about the neck, a puncture mark on the left breast, and incised wounds on the right wrist and upper right arm. He testified that the cause of Trenette's death was stangulation. Dr. Stein also found abrasions and contusions about the necks of Albert, Jr., and Reshonda. He testified that the cause of death of both children was strangulation.

Dale Sayset, special agent, Illinois Department of Law Enforcment, testified at trial that he received a telephone call from Troy Hattery, defendant's father, on January 18, 1983. Hattery told Sayset that he believed defendant was a witness to a triple homicide involving a woman and two children. The following day Sayset again spoke with defendant's father. The father agreed to arrange a meeting between defendant, who was in Texas, and Sayset. That same day Sayset learned that defendant was wanted for questioning in connection with the Anderson homicides and that there was an outstanding warrant for defendant's arrest on an unrelated aggravated-battery charge. The next day, on January 20, 1983, Sayset and another agent met defendant's father at O'Hare airport. Defendant's mother and sister also were present. When

defendant's flight arrived shortly after 10:30 a.m., Sayset introduced himself to defendant, advised him that he was under arrest for aggravated battery and read him the Miranda warnings. Defendant was then transported to the State's Attorney's Office. Sayset testified that he did not question defendant about the homicides.

Timothy McMahon, who was an Assistant State's Attorney, testified that he and another assistant began questioning defendant about noon on January 20. After defendant was advised of his constitutional rights, he initially told McMahon that he did not see the killings. He said that he was in the bathroom at the apartment when the killings occurred. When he exited the bathroom, defendant discovered that Mister was gone and that Trônette was dead. After a few minutes defendant fled the apartment.

Defendant also related that he was a member of the Black Gangster Disciples and that he was the bodyguard of a person named Nimrod, a leader of a north side faction of the Disciples.

McMahon testified that he then confronted defendant with certain inconsistencies between defendant's initial story and the police reports. In response, defendant gave another version of what happened. In the second version, defendant stated that when he exited the bathroom he saw Mister stangling Trenette.

Thereafter, defendant was transported to the Chicago police department crime laboratory by Officer Chris Grogman. A short time later, Grogman was informed by a department laboratory technician that defendant wished to speak to him. As Grogman walked into the room where de-

fendant was being held, defendant stated, "I did it, I'm sorry I caused you any trouble." Grogman told defendant that they would discuss the killings at the Area Six police headquarters. After arriving at Area Six headquarters and being advised of his constitutional rights, defendant told Grogman that he had killed Trenette and her two children.

At about 10 p.m. on January 20, 1983, defendant met with Assistant State's Attorney William Merritt. Defendant gave an oral statement to Merritt regarding his involvement in the killings. He then agreed to give a statement, confessing to the killings, in the presence of a court reporter.

Defendant's first assignment of error concerns the conduct of his appointed trial counsel. He argues that the trial strategy

employed by his trial counsel amounted to the functional equivalent of a guilty plea without the procedural due process safeguards required by Boykin v. Alabama (1969), 395 U.S. 238, 23 L.Ed.2d 274, 89 S.Ct. 1709, and by our Rule 402 (87 Ill.2d R. 402). Defendant further maintains that defense counsel's actions were totally inconsistent with his plea of not guilty and thus constituted a per se denial of the right to effective assistance of counsel guaranteed by the sixth amendment to the United States Constitution (U.S. Const., amend. VI).

The record indicates that defendant pleaded not guilty to the murder charges. At trial he was represented by two assistant public defenders. The prosecution, in its opening statement to the jury, outlined the allegations against defendant.

The prosecution's opening statement described in detail the events of December 4, 1982, and in particular how defendant allegedly strangled Trenette Anderson and her two children. Immediately thereafter, one of defendant's trial attorneys made the following opening statement to the jury:

> "Ladies and gentlemen of the jury, he [defendant] did it. He did everything [the prosecution] just told you. He did it to save the lives of his own family, his mother and his sisters, because he knew that this man [Rufus Mister] would have killed them or had them murdered if he refused his orders. This man is a leader of the Diciples [sic] Street Gang. He and another man named Nimrod forced, ordered this man. Charles Hattery, to do what you heard [the prosecution] say he did.

> We are not asking you to find Charles Hattery not guilty. At the end of your deliberations, you will find him guilty of murder. We are asking you to consider the evidence that you hear today and in the next few days to explain why he did the horrible thing that he did. Once you have found him guilty, we will proceed and you will find him eligible for the death penalty. The question and the only question facing you, will be whether to impose the death penalty on Charles Hattery for trying to save the life of his family. Thank you." (Emphasis added)

During the guilt-innocence phase of the trial, defense counsel advanced no theory of defense. They presented no evidence of their own, and chose not to make a closing statement to the jury.

Instead, defense counsel attempted to develop on cross-examination the theory that defendant was compelled by Rufus Mister to kill the victims. Compulsion is not a defense to an offense punishable by death (see Ill. Rev. Stat. 1981, ch. 38, par. 7-11), but can, if the threat of death or bodily harm is imminent, constitute a mitigating circumstance sufficient to preclude the imposition of the death penalty. (See Ill. Rev. Stat. 1981, ch. 38, par. 9-1(c)(4).) In an effort to prove their compulsion theory, defense counsel elicited from prosecution witnesses the fact that defendant and Rufus Mister were members of the Black Gangster Disciples Street Gang; that defendant was a bodygurard to a Disciples' leader named Nimrod; that Mister was about to be appointed a general in the Disciples' organization by

Nimrod; and that Mister threatened to harm defendant and his family if defendant refused to comply with Mister's orders to kill Trenette Anderson and her two children.

Defendant's attorneys also elicited from prosecution witnesses the fact that defendant, at the request of his parents, returned voluntarily from Texas and met with police after he learned that there was a warrant for his arrest, and that he had spoken to his family before confessing to police.

Several times during the guilt-innocence phase of the trial, defendant's attorneys conceded that defendant was truthful when he confessed to the murders. Moreover, defense counsel, on more than one occasion, told the jury that the trial was a "death penalty case." The following

colloquy took place between the trial judge and defense counsel in the presence of the jury:

> [DEFENSE COUNSEL]: I would ask leave at this time, since this is a death penalty case, and the rule of--
>
> THE COURT: No, it is not a death penalty case. It is a finding of guilt, okay.
>
> [DEFENSE COUNSEL]: May I have a sidebar, your Honor?
>
> THE COURT: Despite [defense counsel's] opening statement," (Emphasis added.)

The State during closing argument emphasized the fact that defense counsel had conceded defendant's guilt. The prosecutor stated:

> "Some of you might have been surprised yesterday a

little bit when the Defense got up and said to you we agree that he did it, expecially in light that this is a trial and in order to have a trial the defendant has to plead not guilty. You may be wondering why, why would a defendant come into court, take a trial and say I did it. It doesn't make sense unless of course someone is trying to con you, unless of course it is a trial tactic. He could have plead guilty and had a sentencing hearing but instead he took a trial said I did it but they made me do it. ***Don't be fooled by them admitting it that they are telling you the truth, that if he says I committed these crimes then he must be telling the truth about the reason he did it."

Although the sixth amendment guarantees criminal defendants the right to the

effective assistance of counsel (McMahon v. Richardson (1970), 397 U.S. 759, 771 n.14, 25 L.Ed.2d 763, 773 n.14, 90 S.Ct. 1441, 1449 n.14), courts ordinarily will not second-guess defense counsel's judgment and trial strategy. It is recognized that the independence of defense counsel is essential to a fair trial. Moreover, it is also recognized that no two defense attorney will necessarily agree on the same strategy for a particular case. Therefore, when evaluating ineffectiveness claims, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance ***." Strickland v. Washington (1984), 466 U.S. ___, ___, 80 L.Ed.2d 674, 694, 104 S.Ct. 2052, 2066.

The court in Strickland announced a two-part test for judging ineffectiveness

claims. Under the test, a defendant must first show that his counsel's performance "fell below an objective standard of reasonableness." (466 U.S. ___, ___, 80 L.Ed. 2d 674, 693, 104 S.Ct. 2052, 2065.) Defendant also must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. ___, ___, 80 L.Ed.2d 674, 698, 104 S.Ct. 2052, 2068.

However, the court in Strickland also noted that there are some circumstances so likely to prejudice the accused that such prejudice need not be shown, but instead will be presumed. (466 U.S. ___, ___, 80 L.Ed.2d 674, 696, 104 S.Ct. 2052, 2067). In a companion case, United States v. Cronic (1984), 466 U.S. ___, 80 L.Ed.2d 657, 104 S.Ct. 2039), the court emphasized

that the sixth amendment requires, at a bare minimum, that defense counsel act as a true advocate for the accused. Where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there had been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." (466 U.S. ___, ___, 80 L.Ed. 2d 657, 668, 104 S.Ct. 2039, 2047.) The court in Cronic explained:

> "[T]he adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an advocate' [citation]. The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a

> true adversarial criminal trial had been conduced - even if defense counsel may have made demonstrable errors - the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." (466 U.S. ___, ___ 80 L.E.2d 657, 666, 104 S.Ct. 2039, 2045-46.)

In Francis v. Spraggins (11th CIr, 1983), 720 F.2d 1190, cert. denied (1985), ___ U.S. ___, 84 L.Ed.2d 835, 105 S.Ct. 1776, the petitioner was convicted of murder and rape in a Georgia court and sentenced to death on the murder conviction. Defense counsel conceded petitioner's guilt in his argument to the jury at the close of the guilt-innocence phase

of petitioner's bifurcated trial. Subsequently petitioner filed a petition for a writ of habeas corpus in United States district court. The United State's court of appeals affirmed the district court's award of a writ of habeas corpus on the ground that counsel's concession of his client's guilt constituted ineffective assistance of counsel. The court stated:

> "Where a capital defendant, by his testimony as well as his plea, seeks a verdict of not guilty, counsel, though faced with strong evidence his client, may not concede the issue of guilt merely to avoid a somewhat hypocritical presentation during the sentencing phase and thereby maintain his credibility before the jury. Even though an adverse verdict would have the effect of precluding further argument on the issue of guilt,

> counsel does not have license to anticipate that effect and to concede the issue during the guilt/innocence phase simply because an adverse verdict appears likely." 720 F.2d 1190, 1194.

Similarly, in Wiley v. Sowders (6th Cir. 1981), 647 F.2d 642, cert. denied (1981), 454 U.S. 1091, 70 L.Ed.2d 630, 102 S.Ct. 656, the court upheld the award of a writ of habeas corpus where, during petitioner's State criminal trial for theft, burglary and being a persistent felony offender, his defense counsel admitted petitioner's guilt. The court in Wiley concluded that defense counsel's concession of guilt constituted ineffective assistance of counsel because it nullified petitioner's right to have the issue of guilt or innocence presented to the jury as an adversarial issue. The court explained:

"Unquestionably, the constituional right of a criminal defendant to plead 'not guilty,' *** entails the obligation of his attorney to structure the trial of the case around his client's plea. ***In those rare cases where counsel advises his client that the latter's guilt should be admitted, the client's knowing consent to such trial strategy must appear outside the presence of the jury on the trial record in the manner consistent with Boykin v. Alabama (1969), 395 U.S. 238, 23 L.Ed.2d 274, 89 S.Ct. 1709.

Although statements made by attorneys in closing arguments are not evidence, nevertheless, for all practical purposes, counsel's admission of guilt on behalf of his client denied to petitioner his constitional right to have his guilt or innocence decided by the jury. Petitioner, in pleading not

> guilty, was entitled to have the issue of his guilt or innocence presented to the jury as an adversarial issue. Counsel's complete concession of petitioner's guilt nullified the adversarial quality of this fundamental issue." (647 F.2d 642, 650.)

In similar cases, courts have held that the admission of an accused's guilt by his defense attorney violates the defendant's sixth amendment right to effective assistance of counsel. See Mullins v. Evans (10th Cir. 1980), 622 F.2d 504; State v. Wiplinger (Minn, 1984); 343 N.W.2d 858; People v. Fisher (1982), 119 Mich. App.445, 326 N.W.2d 537, People v. Schultz (1978), 85 Mich. App.527, 271 N.W.2d 305; People v. Carter (1976), 41 Ill. App.3d 425. Cf. People v. Redmond (1972), 50 Ill.2d 313

(defense counsel's closing argument in which he admitted defendant's guilt constituted denial of due process).

After considering the actions of the defense counsel in the present case we are convinced that the prosecution's case was not subjected to the "meaningful adversarial testing" required by the sixth amendment. (United States v. Cronic (1984), 466 U.S. ___, ___, 80 L.Ed.2d 657, 666, 104 S.Ct. 2039, 2045.) The concession of defendant's guilt by his attorneys was unequivocal. In the opening statement, one of defendant's attorneys told the jury, "We are not asking you to find Charles Hattery not guilty.*** [Y]ou will find him guilty of murder." Defense counsel told the jury that defendant did a "horrible thing," and then stated: "Once you have found him guilty, ***you will find him eligible for

the death penalty." Then defense counsel stated that the only issue to be decided was whether defendant should receive the death penalty. The comments by defense counsel during the guilt-innocence phase that the trial was a "death penalty" case further impressed upon the jury the false notion that the guilt or innocence of the defendant was not at issue but, rather, had already been decided.

Defense counsel's trial strategy-which attempted to show that defendant was guilty of murder but undeserving of the death penalty-was totally at odds with defendant's earlier plea of not guilty. There is no evidence that defendant's consented to his attorney's strategy, and such consent will not be presumed from a silent record. (Cf. Boykin v. Alabama (1969), 395 U.S. 238, 244, 23 L.Ed.2d 274, 280, 89 S.Ct.

1709, 1712-13.) As such, counsel's actions deproved defendant of the right to having the issue of his guilt or innocence presented to the jury as an adversarial issue.

The State argues that defense counsel's actions were sound strategic decisions because the evidence of defendant's guilt was overwhelming. We disagree. Although counsel's strategy may have been reasonable in light of the evidence-a point we need not consider-it was an impermissible one. "[E]ven when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond a reasonable doubt." (United States v. Cronic (1984), 466 U.S. ___, ___ n. 19, 80 L.Ed.2d 657, 666 n.19, 104 S.Ct. 2039, 2045-46 n.19.) Counsel may not concede his client's guilt in the hope of

obtaining a more lenient sentence where a plea of not guilty has been entered, unless the record adequately shows that defendant knowingly and intelligently consented to his counsel's strategy. We therefore hold that defendant was denied the effective assistance of counsel in violation of the sixth amendment. Because we reverse defendant's murder convictions, we only address those other issues which might appear on remand.

Defendant next contends that the trial court should have suppressed the statements he gave to police and prosecutors, alleging that the statements were the product of an illegal arrest. He argues that the complaint, which was the basis of the arrest warrant for aggravated battery, did not supply a finding of probable cause. (See, e.g., Whitely v. Warden of Wyoming State

Penitentiary (1971), 401 U.S. 560, 28 L.Ed.2d 306, 91 S.Ct. 1031; People v. Waitts (1967), 36 Ill.2d 467.) As such, he argues that the aggravated-battery warrant was invalid.

The record reveals that defendant filed a motion to suppress the statements prior to trial. A hearing was held on defendant's motion on July 14, 1983. At that hearing, defense counsel called two witnesses: Troy Hattery, defendant's father, and Dale Sayset, a special agent with the Illinois Department of Law Enforcement. The substance of their testimony concerned the father's arrangements to have defendant meet with police and defendant's subsequent arrest at O'Hare airport on January 20, 1983. None of the evidence introduced at the suppression hearing by defense counsel had any bearing

on the validity of the aggravated-battery warrant. Defense counsel also did not contest the validity of the arrest warrant in his argument on the motion. The record discloses that the whole focus of the suppression hearing was whether defendant's arrest for aggravated battery was a pretext to question defendant about the murders.

On a motion to suppress based on a lack of probable cause to arrest, the initial burden of going forward with the evidence is on the defendant. (People v. Lyles (1985), 106 Ill.2d 373, 387; People v. Black (1972), 52 Ill.2d 544, 553-54.) The record shows that defendant did not present any evidence whatsoever regarding the validity of the aggravated-battery warrant. The defense thus failed to carry its burden of going forward with the evidence and its initial burden or proof. The

State's failure to present evidence on the issue of probable cause to arrest for aggravated battery was obviously the result of defendant's failure to meet his initial burden. (Cf. In re Lamb (1975), 61 Ill.2d 383, 387.) Under the circumstances, we hold that defendant has waived the issue.

Defendant also argues that the trial court erred in refusing to suppress his statements as the product of a pretext arrest. The gist of defendant's argument is that police arrested him on the aggravated-battery warrant as a subterfuge to interrogate him about the Anderson homicides. He maintains that the conduct complained of violated the fourth amendment to the United States Constitution (U.S. Const., amend, IV) and article I, section 6, of our State Constitution's bill of rights. Ill. Const. 1970, art. I, sec. 6.

Defendant attempted to show at the suppression hearng that the statements given to police and prosecutors were the product of the alleged pretext arrest. In support of the motion, defendant called two witnesses. Special Agent Dale Sayset testified that he received a telephone call from Troy Hattery, defendant's father, on January 18, 1983. Hattery told Sayset that he believed defendant was a witness to a triple homicide involving a woman and two children. Sayset told Hattery that he would look into the matter and call him back. The next day, January 19, 1983, Sayset called defendant's father. The latter agreed to arrange a metting between defendant, who was in Texas, and Sayset. Later that day, Sayset spoke to a Chicago police detective. He was told by the detective that defendant was wanted for

questioning in connection with a triple homicide and also that there was an outstanding warrant for defendant's arrest on the aggravated-battery charge. Sayset picked up the warrant from Chicago police.

On January 20, 1983, Sayset and another agent met defendant's father, mother and sister at O'Hare airport. Defendant's father directed the agents to the airline gate where defendant's flight was due to arrive. When defendant's flight arrived shortly after 10:30 a.m., Sayset introduced himself to defendant, advised him that he was under arrest for aggravated battery, and read him the Miranda warnings. Sayset then transported defendant to the Cook County State's Attorney's office. He testified that he did not question defendant about the homicides.

The testimony of defendant's father was substantially the same as Sayset's. He also testified that he received a telephone call from defendant on Janaury 19, 1983. During that call, the father told defendant that he should return to Chicago, because there was a warrant for his arrest. He did not tell defendant what the arrest warrant charged.

At the close of the evidence, the trial court denied the motion to suppress. After considering all the evidence which was presented to the trial court, we agree that the motion to suppress should have been denied. The only evidence introduced at the suppression hearing indicated that defendant's father arranged to have Sayset meet defendant at O'Hare airport; that prior to the meeting Sayset learned that there was an outstanding warrant for de-

fendant's arrest; that defendant was wanted for questioning with regard to the Anderson homicides; and that upon meeting defendant, Sayset arrested him from aggravated battery. The evidence, without more, was insufficient to show that defendant was arrested on a subterfuge warrant. A trial court's ruling on a motion to suppress will not be disturned unless it is manifestly erroneous. (People v. Hoskins (1984), 101 Ill.2d 209, 212; People v. Holloway (1981), 86 Ill.2d 78, 91; People v. Williams (1974), 57 Ill.2d 239, 246, cert. denied. (1974), 419 U.S. 1026, 42 L.Ed.2d 302, 95 S.Ct. 506.) Based on the evidence presented to the trial court, we cannot say that its ruling on this issue was manifestly erroneous.

For the reasons stated, defendant's convictions for murder are reversed and his death sentence is vacated.

The cause is remanded to the circuit court of Cook County for a new trial.

Judgment reversed;
sentence vacated;
cause remanded.

JUSTICE MILLER, dissenting:

Accepting both the defendant's alternative arguments against the trial strategy followed here, the majority presumes that the defendant was prejudiced by the strategy and that his consent to it must appear on the record. I do not believe that either conclusion is required, and accordingly I dissent.

The right to the effective assistance of counsel "is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." (United States v. Cronic (1984), 466 U.S. ___, ___, 80 L.Ed.2d 657,

667, 104 S.Ct. 2039 2046.) Ordinarily, then, a defendant must show that he has been prejudiced by counsel's deficient performance, though there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." (466 U.S. ___, ___, 80 L.Ed.2d 657, 104 S.Ct. 2039, 2047.) When the adversarial process breaks down -- when, for example, counsel is denied, or utterly fails to contest the State's case, or, because of attendant circumstances, finds it impossible to provide adequate representation -- then prejudice may be presumed. (See 466 U.S. ___, ___, 80 L.Ed.2d 657, 668-69, 104 S.Ct. 2039, 2047-48.) The likelihood of prejudice in those cases is so great "that case by case inquiry into

prejudice is not worth the cost." (Strickland v. Washington, (1984), 466 U.S. 668, 692, 80 L.Ed.2d 674, 696, 104 S.Ct. 2052, 2067.) Generally, too, the impairment is something for which the government is responsible and therefore can prevent. (466 U.S. 668, 692, 80 L.Ed.2d 674, 104 S.Ct. 2052, 2067.) In neither Cronic nor Strickland, however, did the Supreme Court presume prejudice. In Cronic, a prosecution for mail fraud stemming from a check-kiting scheme, the Supreme Court rejected the inference by the court of appeals that counsel had been ineffective; that inference had been based on several circumstances, including the length of time counsel had had to prepare for the case, counsel's youthfulness, and his principal expertise in a different area of law. In Strickland the court held that

in the circumstances there, counsel's failure to present at a capital sentencing hearing additional character or psychological evidence regarding the defendant was neither a deficiency in performance nor a matter resulting in actual prejudice to the defendant.

I do not believe that this case implicates any of the concerns identified by the Supreme Court as warranting a presumption of prejudice. The adversarial process did not break down here. Defense counsel's strategy was not a matter that the prosecutor or trial judge devised. The primary issue in the proceedings was not whether the defendant was guilty of offenses punishable by death, but whether he should be sentenced to death. In this regard, I would note that on appeal here, the defendant has not challenged the suf-

ficiency of the evidence of his guilt. That evidence was overwhleming -- it included the defendant's confessions to these gruesome crimes -- and trial counsel may well have concluded that the strategy used here was a reasonable course to follow.

Going to trial preserved for the defendant matters that a guilty plea necessarily would have waived. One of the most significant of those was the ruling on his suppression motion, and the majority's treatment of that issue demonstrates the value of preserving it for review. Moreover, although complusion is not a defnese to the crimes charged here (see Ill. Rev. Stat. 1981, ch. 38, par. 7-1), it may, as a mitigating circumstance, preclude a sentence of death (see Ill. Rev. Stat. 1981, ch. 38, sec. 9-1(c)(4)), and defense counsel used the trial to develop a theory of

complusion in a way that would not have been practicable at a sentencing hearing. The defendant was tried jointly with Rufus Mister, the person who, counsel argued, compelled the defendant to commit the murders. The presence of the codefendant, charged on a theory of accountability for the same crimes, was used to strengthen the defendant's claim of compulsion. Also, through cross-examination of the State's witnesses at trial, defense counsel brought out information tending to support the theory that defendant's role in the crimes was compelled by Mister.

In several ways, then, the jury was educated, as it were, on the defendant's evidence in mitigation through information and impressions that could not have been duplicated at a sentencing hearing. Counsel may have believed, though, that the surest

way to preserve credibility before the jury for his later argument, that the death sentence should not be imposed, was to acknowledge that the defendant had committed offenses for which a sentence of death could be imposed. What occurred here was analogous to the common practice in jury trials of acknowledging guilt of one offense to avoid conviction for another. To a similar end, counsel may have reasonably believed here that the strategy adopted at the trial and sentencing hearing was more likely to prevent a sentence of death than any other course of defense.

Moreover, this choice of strategy was not inconsistent with anything that the defendant himself did or said at trial. In this regard I would note that in a number of cases cited by the majority, acknowledgments of guilt by counsel were, indeed,

contradicted by the defendants. See Francis v. Spraggins (11th Cir. 1983), 720 F.2d 1190 (defendant testified, denying that he committed the crime or that he made statements to the police, but counsel later conceded defendant's guilt to jury, asking for a sentence other than death); People v. Fisher, (1982), 119 Mich. App. 445, 326 N.W.2d 537 (defendant testified in support of his insanity defense, but in closing counsel asked instead for finding of guilty but mentally ill); State v. Wiplinger (Minn. 1984), 343 N.W.2d 858 (counsel, in cross-examination of State's witnesses, effectively conceded defendant's identity as person involved in offense; defendant interrupted the trial and voiced his objection to that); cf. Mullins v. Evans, (10th Cir. 1980), 622 F.2d 504 (fearful that defendant's parole eligibility date

under trial judge's sentence for conviction for lesser offense would be later than under mandatory life term for conviction for greater offense, counsel "threw the fight" and did whatever was possible to ensure conviction for greater offense; trial found to be a sham, and therefore defendant's acquiescence to strategy was unimportant).

Finally, the proceedings here were not tantamount to a guilty plea, and the defendant was not required to be admonished of his trial rights, in the manner of our Rule 402 (87 Ill. 2d R. 402), when defense counsel's strategy became evident. Unlike People v. Smith, (1974), 59 Ill. 2d 236, and People v. Stepheny (1974), 56 Ill. 2d 237, defense counsel did not make an agreement with the prosecutor regarding the outcome of the case or stipulate to the suf-

ficiency of the evidence of the defendant's guilt. Instead, defense counsel required the State to put on its witnesses, remaining free to challenge the sufficiency of the State's evidence, and counsel did so, moving for a directed verdict at the close of the State's case. Moreover, counsel moved to suppress the defendant's confession. See People v. Sampson, (1985), 130 Ill. App. 3d 438, and People v. Fair, (1975), 29 Ill. App. 3d 939 (in stipulated bench trial, presentation of factual or legal defense, including motion to suppress confession, renders unnecessary admonitions regarding trial rights).

Because the adversarial process did not break down here, I believe that an inquiry into prejudice is worth the cost. I would not presume that the defendant was prejudiced by trial counsel's choice of

strategies, nor would I presume that the choice was made without the defendant's consent. Instead, I would require in this case that the defendant establish that the strategy was adopted without his consent or, failing that, that he was prejudiced by trial counsel's representation.

Whether the trial strategy should have been permitted is not the question here; the question is whether the strategy was without the defendant's consent or was prejudicial to him. The defendant should not be permitted now to question the trial strategy, which allowed him to preserve pretrial issues for appeal, test the legal sufficiency of the State's case, and offer mitigating evidence in the guilt-or-innocence phase, while at the same time attempting to maintain his credibility with the jury, without a showing on his part of

his lack of consent to the strategy, or of prejudice to him.

APPENDIX B

Order of the Illinois Supreme Court denying rehearing in People v. Charles Hattery (No. 58789, Nov. 21, 1985)

ILLINOIS SUPREME COURT

JULEANN HORNYAK, CLERK

February 4, 1986

Ms. Joan Cherry
Asst. State's Attorney
574 Richard J. Daley Center
Chicago, Illinois 60602

No. 58789 - People of the State of Illinois, appellee, v. Charles Hattery, appellant. Appeal, Circuit Court (Cook).

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on February 14, 1986.